the deeds and later the lands to Salleh and by doing nothing whatsoever to challenge the elders' decision by, for example, applying to the Land Office for distribution of the deceased's estate) because he knew the truth and that he had a hopeless case.

Inche Jayadeva argues that the evidence called by the plaintiffs and their witnesses on the relationship between the deceased and Saman was hearsay and therefore inadmissible. I allowed the evidence under sections 32(e) and 50(1) of the Evidence Ordinance, No. 11 of 1950 as it is from persons who had special means of knowledge of the relationship of the two persons.

In reaching my conclusion I have not relied in any way on an affidavit sworn by Tok Taha, an old gentleman aged 106 who was prevented by extreme age and illness to attend this trial, and filed in my Court in another matter related to this action.

In view of the above conclusions, I declare that:—

(a) the first plaintiff is the lawful great-nephew and the second plaintiff is the lawful great-grand nephew of Yunus bin Derela, the deceased.

(b) the defendant, Wateh bin Saman and the other children of Saman, namely—

Che Pin bin Saman
Ibrahim bin Saman
Dai bin Saman
Saad bin Saman and
Tijah bin Saman

are not the beneficiaries lawfully entitled to share in the estate of the said Yunus bin Derela, deceased, being children of Munah binti Derela, sister of the deceased who had predeceased the said deceased.

The plaintiffs also pray for an injunction, a receiver, inquiries and accounts. I refrain from making any order as to these until I have had an opportunity of hearing counsel further, when I shall also decide on costs.

Order accordingly.

Solicitors: *Lim, Lim & Oon; Jayadeva & Zahir.*

LIM CHIAM NEO v. TAN SEE TIAM

[O.C.J. (Ismail Khan J.) January 23, 1963]

[Malacca — Civil Suit No. 62 of 1961]

Landlord and Tenant — Recovery of possession — Order of trial judge granting possession — Order approved by both parties dated and entered post dated — Application to set aside Order on various grounds — Whether trial judge has jurisdiction — Control of Rent Ordinance, 1956, s.12(1).

In an action by the plaintiff for recovery of possession an order was made by the trial judge on June 18, 1962 for possession, rent in arrear, mesne profits and costs. Plaintiff's solicitors drew up the order so made and it was approved by the defendant's solicitors on July 31, 1962 but was dated and entered August 1, 1962. Notice of appeal was filed on July 17, 1962 and the defendant's new solicitors filed notice of motion to set aside the order made on June 18, 1962 for various reasons, one of them being that the order was a nullity and ought to be set aside. On October 13, 1962 the defendant's solicitors filed notice of withdrawal of appeal but submitted that the order ought to be set aside as a nullity on the following grounds: (i) the notice to quit was invalid as the effective date when the rent fell due was not stated therein; (ii) even if the notice to quit was valid the acceptance of part payment of arrears of rent created a fresh tenancy; (iii) that the order or judgment should not have been made unless the conditions specified in section 12(1) of the Control of Rent Ordinance were fulfilled.

Held: (1) it is not necessary in determining a tenancy to state expressly in the notice to quit the effective date when the rent falls due;

(2) the fact that rent was in arrear for more than 14 days entitled the plaintiff to an order for possession under section 12(1)(a) of the Control of Rent Ordinance;

(3) it was for the Court of Appeal to correct any errors or irregularities in the order of the trial judge as the trial judge had no jurisdiction to do so after judgment had been pronounced.

Case referred to:—

(1) *Fieldrank Ltd.* v. *E. Stein* [1961] 1 W.L.R. 1287.

ACTION.

H. B. Ball for the plaintiff.

F. Keith Sellar for the defendant.

Cur. Adv. Vult.

Ismail Khan J.: This was an action by a landlord to recover possession of rent-controlled premises from a tenant. Both parties were at all times represented by advocates and solicitors.

On 18th June, 1962, upon a motion for judgment by counsel on behalf of the plaintiff, I made an order for possession, rent in arrear, mesne profits and costs. The order so made was drawn up by the plaintiff's solicitors on 31st July, 1962, and approved by the defendant's solicitor on the same day. It was thereupon dated and entered 1st August, 1962, which date appears to be an error since judgment was pronounced by me on 18th June, 1962, and I had then made no order for post-dating — see Rules of the Supreme Court, Order 41 rule 3 and Form 10 in Appendix F.

A notice of appeal was filed on 17th July, 1962. On 12th September, 1962, the defendant filed a notice of change of solicitors and on 17th September, 1962, his present solicitors filed notice of motion to set aside the order of 18th June, 1962, for various reasons which have been set out at considerable length. One of the grounds was that the order of 18th June, 1962, was a nullity and ought to be set aside. On 13th October, 1962, the defendant's solicitors filed notice of withdrawal of appeal.

Now although the plaintiff rested her claim to repossession on two grounds, it was sufficient for her purpose to prove only one of them in order that the Court may make an order under section 12(1) of the Control of Rent Ordinance, 1956. In the event, it was necessary in my view to consider only the ground set out in paragraph (a) that rent lawfully due had been in arrear for more than fourteen days.

The writ was served on the defendant on 13th October, 1961, and he entered appearance on 16th October. The defendant paid into Court on 25th October, 1961, the sum of $500 bringing the balance of rent in arrear up to 31st July, 1961. When the writ was filed on 3rd October, 1961, the rents for August and September had already fallen due as well. But the rents for those two months were not paid into Court nor was any allegation made of tender thereof to the plaintiff.

On 26th October, 1961, the plaintiff took out a summons for leave to sign final judgment; the date of hearing was fixed for 20th November, 1961. An affidavit in support was sworn by the plaintiff on 24th October, 1961, in the usual form verifying the cause of action.

In the meantime the defendant filed his defence on 3rd November, 1961, the main point of which, thrice repeated in paragraphs 2, 7 and 10, was that the notice to quit served on the defendant was "bad in law as the effective date when the rent fell due was not stated therein and therefore the defendant is still and lawfully the tenant of the said premises, the notice to quit notwithstanding". The plaintiff's reply was filed on 16th November, 1961, and on the same day the defendant filed his affidavit showing cause against the application for leave to sign final judgment. The material averment relevant to the issue was in paragraph 3 alleging that the notice to quit was bad for the same reason stated in the defence.

On 20th November, 1961, I made an order for conditional leave to defend, the condition being that the defendant should deposit in Court "all the mesne profits at the rate of $125 per month commencing from the first day of August, 1961, in respect of the premises No. 45, Java Road. Malacca, at the end of each month". I thought that this was a proper case where I ought to give only conditional leave bearing in mind what Devlin L.J. (as he then was) said in *Fieldrank Ltd.* v. *E. Stein* [1] at page 1289, viz.:—

> " For my part, I should be very glad to see some relaxation of the strict rule in *Jacobs* v. *Booth's Distillery Company* (85 L.T. 262). I think that any judge who has sat in chambers to hear summonses under Order 14 has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, he is nevertheless left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is no grave hardship on the defendant being made to pay money into court. For my part, I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency."

No payments whatsoever were made pursuant to this order of the rents or mesne profits accruing since 1st August, 1961, and on 17th May, 1962, the solicitors for the plaintiff filed notice of motion for the defence to be struck out for non-compliance with the order of 20th November, 1961, and for judgment in terms of the statement of claim. Mr. Ball for the plaintiff moved the Court for judgment accordingly on 18th June, 1962, and judgment for the plaintiff was pronounced by me in open court in the presence of Mr. Devadason, counsel for the defendant.

The appeal against the order having been withdrawn, it has now been submitted that I ought nevertheless to set it aside as a nullity for three reasons:—

(a) that the notice to quit was invalid, with the result that the tenancy had never been lawfully determined as required by section 12(4) of the Control of Rent Ordinance, 1956;

(b) that even if the notice to quit was valid there was a fresh tenancy created by acceptance by the plaintiff of part payment of the arrears of rent;

(c) that the order or judgment should not have been made or given without inquiry whether any of the conditions of section 12(1) were fulfilled.

All the above grounds may be summarily disposed of by saying that if I erred at all in law or in some procedural irregularity, none of the grounds given suffice to make out that my order was a nullity. Whether or not the notice was valid was a question that had been decided by me in the affirmative. I cannot set aside any order as a nullity even assuming for the sake of argument that I have now come to the conclusion that I was wrong on any of the points raised. As a matter of fact, however, I was and still am of the opinion that the attack made on the notice was on a ground totally untenable because it is not necessary in determining a tenancy to state expressly in the notice the effective date when the rent falls due. As to the third reason in particular the fact that rents were in arrear for more than fourteen days was clearly incontrovertible; hence the plaintiff was entitled to an order for possession under paragraph (a) of section 12(1) and the Court undoubtedly had jurisdiction to make the order.

As to the other grounds on which it is submitted in the alternative that I should discharge or vary the order of the 18th June, 1962, I now only say briefly that it is the Court of Appeal that should correct any of the errors or irregularities complained of. I have no jurisdiction to discharge or vary the order for the simple reason that after judgment pronounced I am *functus officio*.

The application is dismissed.

The question of costs having been reserved, I shall now hear counsel on it.

Application dismissed.

Solicitors: *Allen, Gledhill & Ball; Sault, Keith Sellar & Co.*